Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Request of	)	
	)	
CELLULAR TELECOMMUNICATIONS	)	
INDUSTRY ASSOCIATION	)	RM-8179
	)	
For Declaratory Ruling and	)	
Amendment of the Commission's	)	
Policies and Rules Pertaining to	)	
the Regulation of Cellular Carriers	)	

COMMENTS

GTE Mobile Communications
Incorporated, GTE Mobilnet
Incorporated and Contel
Cellular Inc.

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SUMMARY

GTE endorses CTIA's attempt to clarify the applicability of federal tariffing requirements to cellular carriers. The Commission's cellular policies have fostered the development of a vigorously competitive market for mobile services in which facilities-based carriers and resellers aggressively vie for market share. Furthermore, cellular carriers face substantial additional competition from existing and emerging wireless services, such as SMRs, that offer direct substitutes for cellular service. Traditional tariffing requirements are wholly inappropriate in such a competitive market because they would undermine the existing balance among mobile service providers and inhibit the provision of diverse, innovative and low cost services to the public. Therefore, tariff regulation should be as minimal as possible and consistently applied to all like services.

In a highly competitive marketplace, cellular carrier services should be classified as non-dominant. Although the Commission has never directly evaluated the appropriate regulatory status of cellular, it is clear that cellular carriers do not possess market power warranting dominant treatment. Consequently, a finding of non-dominance for cellular would be consistent with the FCC's past precedents in other services.

GTE also fully supports CTIA's requested changes to the tariff rules for cellular carriers, including elimination of the notice period for tariff filings, allowing carriers to change tariff filings at any time, relieving carriers of technical form and supporting information requirements, and permitting the use of "banded rates." These changes will facilitate competition by emulating, to the maximum extent possible, the workings of a competitive market.

Finally, GTE agrees with CTIA that the vast majority of cellular offerings are not subject to federal tariffing requirements. Notwithstanding any interstate transmission component, most cellular offerings are exchange service in nature. They are provided on an essentially intrastate basis that, under Section 221(b) of the Act, places them outside the FCC's jurisdiction. The mobile, wireless nature of cellular service and the history of the development of cellular markets support the broadest possible construction of that section to exempt the vast majority of cellular services from federal tariffing requirements. Similarly, other services offered by cellular carriers, such as those provided pursuant to inter-carrier contracts and billing and

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COMMENTS

GTE Mobile Communications Incorporated, GTE Mobilnet Incorporated and Contel Cellular Inc. (collectively "GTE"), herewith submit their comments filed in support of the Cellular Telecommunications Industry Association ("CTIA") Request for Declaratory Ruling and Petition for Rulemaking.[1]

I. INTRODUCTION

GTE strongly supports CTIA's request for clarification that cellular carriers and their services are non-dominant under Commission rules. Cellular carriers participate in a highly competitive marketplace for which traditional tariff regulation would be inappropriate and contrary to the public interest. It follows that tariff regulation -- to the extent legally compelled by the AT&T v. FCC decision -- should be as minimal as possible and consistently applied to all like

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[1] CTIA Request for Declaratory Ruling and Petition for Rulemaking, (filed Jan. 29, 1993) ("CTIA"); see Public Notice, Report No. 1927 (Feb. 17, 1993).

services. Finally, the Commission should recognize that the vast majority of cellular services are not subject to federal tariffing obligations consistent with Sections 211 and 221(b) of the Act, dealing with inter-carrier contracts, and interstate exchange services, respectively.

The relief requested by CTIA is particularly important because tariff regulation is wholly unnecessary and cellular carriers face extensive competition from private carrier service providers not subject to any tariffing obligations. Commission action to minimize the costs, delays and burdens of tariffing for cellular carriers will help mitigate the anticompetitive consequences of disparate regulation among competing service providers. Accordingly, the public interest would be affirmatively served by limiting the adverse effects of judicially mandated tariff obligations to the greatest extent possible.

II. CELLULAR CARRIERS PARTICIPATE IN A HIGHLY COMPETITIVE MARKETPLACE FOR WHICH TRADITIONAL TARIFF REQUIREMENTS ARE WHOLLY INAPPROPRIATE

The market for cellular services is subject to vigorous competition from facilities-based carriers as well as

carrier tariffing obligations on cellular carriers would only serve to impede competition among carriers and create a regulatory disparity between cellular carriers and their non-tariffed competitors. The Commission should, therefore, seek to minimize the tariffing obligations of cellular carriers consistent with existing statutory constraints.

A. Cellular Carriers Face Significant Competition Both From Inside the Cellular Industry and From Other Wireless Services

The cellular industry has flourished under the Commission's pro-competitive regulatory policy for mobile services. Consumers have enjoyed greater choices and lower prices as a result.[2] The FCC acknowledged as much in the PCS proceeding, where it revealed that its faith in this policy

> has been amply justified by the nationwide availability of cellular service; the competition among cellular providers for customers; the diverse array of service and equipment options; and the aggressive behavior of cellular providers in implementing new technologies . . . .[3]

The agency's success in promoting a competitive cellular marketplace can be attributed to a number of factors. First, the existence of competing cellular carriers within each market has guaranteed vigorous competition, both direct and

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[2] See Amendment of the Commission's Rules to Establish New Personal Communications Services, 7 FCC Rcd 5676, 5678 (1992) (Notice of Proposed Rule Making) ("PCS Notice").

[3] Id.

through agents, for the provision of cellular service.[4] The Commission has concluded that "it appears that facilities-based carriers are competing on the basis of market share, technology, service offerings, and service price."[5] Second, these carriers are subject to effective competition from numerous cellular resellers. Thus, it is not surprising that the FCC has stated that "we believe that our rules, together with the competition between cellular licensees in the same market, are adequate to ensure that the cellular marketplace is competitive."[6]

Equally importantly, cellular carriers face additional actual and potential competition from a number of wireless services outside of the cellular industry, including specialized mobile radio services (SMRs), enhanced specialized mobile radio services (ESMRs), mobile satellite

In fact, providers of many of them may elect to be treated as private carriers, free from federal and state regulations.

SMRs already compete with cellular services for many business customers. Over the past 15 years, SMRs have evolved from conventional radio dispatch systems to trunked systems offering interconnection of mobile radio units with the public switched telephone network.[7] The FCC's Policy and Planning Branch has even gone so far as to state that, "SMRs generally offer business a less expensive alternative to cellular service . . ."[8]

Enhanced SMRs, which involve digital transmission technology and reuse of frequencies akin to cellular networks, are rapidly evolving into direct (and largely unregulated) competitors to cellular service in many major markets.[9] The Commission recently observed that "trends in the Specialized Mobile Radio Service appear to indicate that private carrier land mobile providers have begun to emerge as innovative and viable competitors to common carrier land

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[7] Specialized Mobile Radio, Doron Fertig, Policy and Planning Branch, Land Mobile and Microwave Division, Private Radio Bureau, FCC, March 1991 (rev.) at 5-10 ("Specialized Mobile Radio").

[8] Id. at 10.

[9] See e.g., Dial Page Request For Waiver To Implement Digital Trunked SMR System, Public Notice, DA 92-1144 (Aug. 20, 1992) ("Dial Page Request for Waiver"); FLEET CALL, INC. For Waiver and Other Relief To Permit Creation of Enhanced Specialized Mobile Radio Systems in Six markets 6 FCC Rcd 1533 (1991)(Memorandum Opinion and Order).

mobile service offerings."[10] Significantly, the FCC has proposed to issue national 900 MHz SMRs licenses, which would afford them a substantial geographic and operational advantage over cellular licenses.[11]

PCS also is expected to emerge as a direct competitor to cellular service in the near future.[12] The Commission has manifested a clear intent to license and regulate PCS in a manner that will maximize competition to cellular systems.[13]

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[10] Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, 7 FCC Rcd 4484, 4488 (1992).

[11] Amendment of Parts 2 and 90 of the Commission's Rule to Provide for the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, Docket No. 89-553 (released Dec. 18, 1989)(Notice of Proposed Rulemaking); First Report and Order and Further Notice of Proposed Rulemaking, Docket No. 89-553 (released Feb. 12, 1993) (proposing to create three nationwide licenses of 20 channels each).

[12] See, e.g., Cellular CPE Report and Order, 7 FCC Rcd at 4029. GTE notes that it is appropriate to consider emerging potential competitors to cellular in determining whether cellular carriers possess market power and are, therefore, dominant carriers. See e.g., Metro Mobile CTS v. NewVector Communications, Inc., 661 F. Supp. 1504, 1522 (D. Ariz. 1987) (citing American Bar Association, Antitrust law Developments 2d at 120 (1984)), aff'd. 892 F.2d (9th Cir.

The PCS Notice states that "[w]e expect that PCS and cellular licensees . . . will compete on price and quality."[14] Apparently to facilitate this development, the agency has proposed rules governing PCS that emulate cellular service in many respects, including the size of spectrum blocks,[15] service areas,[16] and power and antenna height limits.[17]

B. Tariffing and the Public Disclosure to Competitors of Cost Data Required of Dominant Carriers Are Wholly Inconsistent With the Operation of the Competitive Cellular Market

Traditional tariff regulation of the competitive cellular industry would have a number of adverse consequences for both providers and users. Such a regulatory regime would inhibit price competition, service innovation, and the carriers' ability to respond quickly to market conditions and

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[13](...continued)
. provide additional competition to the two cellular operators in each cellular market").

[14] PCS Notice at 5691.

[15] See id. (PCS licensees should be assigned an amount of spectrum comparable to cellular licensees).

[16] See id. at 5699-5700 (tentatively concluding that PCS service areas should be larger than those initially licensed in cellular because cellular service areas have consolidated).

[17] See id. at 5721 ("[T]here may be a demand for larger cells to accommodate high speed vehicular subscribers . . . . comment is requested on whether PCS power and antenna height limits should be comparable to those used for cellular . . . .").

customer demands.[18] Cellular carriers' historic ability to engage in these classic "market" activities has been an important factor in the vigorous growth of cellular services.[19]

In contrast, the application of traditional tariff requirements to cellular carriers would undermine competition by forcing them to conform their service offerings to a narrow spectrum of choices and to divulge confidential and strategic cost and pricing data to their competitors. Price leadership, service limitations and regulatory delay could supplant the positive market behavior discussed above. It follows that traditional Title II regulation would impose heavy administrative costs on cellular carriers and users that, because there are no countervailing public benefits, simply cannot be justified in such a competitive market.[20]

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[18] See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor ("Competitive Carrier"), 91 FCC 2d 59, 65 (1982) (Second Report and Order), recon., 93 F.C.C.2d 54 (1983).

[19] See PCS Notice, 7 FCC Rcd at 5678.

[20] See, e.g., Revisions to Part 21 of the Commission's Rules regarding the Multipoint Distribution Service, 104 F.C.C.2d 283, 293 (1986) (Notice of Proposed Rulemaking) ("MDS Notice").

C. The Regulatory Disparity Between Tariffed and Non-Tariffed Service Providers Would Cause Serious Competitive Dislocations

Perhaps most importantly, many of the wireless services that compete with cellular service are not or may not be required to file tariffs for their offerings. This creates a situation in which only a few of many competitors may be unfairly disadvantaged by government requirements. As explained above, SMRs and ESMRs operators are considered private carriers and are therefore not subject to any federal, state or local rate regulation, entry regulation, foreign ownership restrictions, or resale obligations.[21] Yet, in many markets in the Southeast and the West GTE will compete directly with ESMRs such as Dial Page[22] and Fleet Call, only recently authorized by the Commission. Imposition of onerous tariffing requirements on GTE in those markets would substantially undermine its ability to compete effectively.

Under such tariffing requirements, GTE would be forced to file tariffs for all pricing and service modifications made in response to competitive conditions. The notice periods associated with tariff filings and changes to filed

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[21] See 47 U.S.C. § 332 (1991).

[22] Dial Page has requested waivers to implement a digital trunked SMR system in nine southeastern states. See Dial Page Request for Waiver.

rates would impede GTE's ability to respond quickly to changes in the market, while allowing untariffed competitors time to implement their responses before the tariff becomes effective. In addition, GTE would be forced to publicly

A. The FCC Has Never Directly Evaluated the Appropriate Regulatory Status of Cellular Carriers

The Commission has never affirmatively examined the competitive status of cellular service in the interstate communications market.[23] In the infancy of cellular service -- 1985 -- the Commission labelled cellular carriers as dominant. However, this was not accompanied by any evaluation of the market power of cellular carriers.[24]

As the Commission recently acknowledged in its interim waiver of Part 61 for cellular carriers, "we should . . . address the issue of cellular's status as a dominant carrier on the merits."[25] Under the FCC's rules, a carrier is deemed to be non-dominant unless the agency has expressly found it to be dominant after making a market power determination.[26] Because the FCC's prior statements regarding the dominant status of cellular carriers are not based upon such a finding

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[23] Petition for Waiver of Part 61 of the Commission's Rules, DA 93-196 (released Feb. 19, 1993) at ¶ 5 (Order).

[24] Competitive Carrier, 98 FCC 2d 1191, 1204 n.41 (Fifth Report and Order). Indeed, in the same footnote that the Commission labelled cellular carriers dominant it also stated that "their ability to engage in anticompetitive

and no grounds exist to find market power now, cellular carriers should promptly be classified as non-dominant consistent with the FCC's treatment of similarly situated carriers.

B. Cellular Carriers Are Clearly Non-Dominant Given Marketplace Conditions and Applicable Commission Standards

The highly competitive nature of the cellular marketplace warrants a finding that cellular carriers do not possess market power and a declaration that cellular carriers are non-dominant. The cellular service market is subject to extensive competition, starting with the facilities-based competition fostered by the duopoly nature of each local market.[27] As demonstrated fully in section II above, cellular carriers participate in a robustly competitive marketplace.

Non-dominant status for cellular would be fully consistent with applicable Commission standards. In the pending local multipoint distribution service (LMDS) proceeding, the Commission found non-dominance in a duopoly market in which each LMDS operator will be assigned one gigahertz of spectrum. The FCC tentatively concluded that LMDS operators electing common carrier status should be

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[27] Cellular Lottery Rulemaking, 98 F.C.C.2d 175, 196 (1984) (duopoly licensing scheme has resulted in "highly competitive market structure").

classified as non-dominant carriers because "both video and telecommunications services are so well represented in the

are not pure substitutes for a service, but which serve limited parts of the same market.[30] Of course, other existing and proposed mobile radio services in many cases offer a complete substitute for cellular, as the FCC has acknowledged. Accordingly, the Commission's obligation to treat similarly situated parties fairly supports a declaration of non-dominance for cellular carriers.

IV. THE FCC'S TARIFFING REQUIREMENTS FOR NON-DOMINANT INTERSTATE CELLULAR SERVICES SHOULD FACILITATE RATHER

cellular services.[31] These historic developments are a direct result of the prevailing Commission policy of relieving cellular carriers from the burdens associated with Title II regulation and the tariff filing process. In short, the Commission has placed its faith in the competitiveness of the cellular market, and cellular carriers have "amply justified" that faith.[32] It follows that the FCC should examine its existing non-dominant tariffing rules and amend them as shown below to preserve the competitive cellular

permit cellular carriers to file tariffs containing "banded rates."[34]

Requiring notice periods for tariff filings and modifications would necessitate unreasonable and unwarranted delays in market responses by cellular providers.[35] Such notice periods would reduce competition by discouraging carriers from providing new service offerings and adopting aggressive marketing plans. Given the highly competitive nature of the cellular market, there can be no justification for requiring notice periods of any length greater than the one day proposed by the Commission.[36] Similarly, cellular market experience shows that the technical form requirements of the current rules also would serve no useful purpose.[37]

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[34] GTE notes that, under the Commission's current streamlined rules for non-dominant carriers, such carriers' tariffs are presumed lawful under Section 1.773 of the Commission's rules and non-dominant carriers need not file Section 61.38 cost support. See, e.g., Cellular Telecommunications Industry Association Petition for Waiver of Part 61 of the Commission's Rules, DA 93-196 at ¶ 2 (released Feb. 19, 1993) (Order). If cellular carriers are not found to be non-dominant, GTE requests that the Commission declare that cellular carriers' tariffs are presumed lawful and relieve carriers of the requirement to file cost data in any event.

[35] See 47 C.F.R. §§ 61.58, 61.59.

[36] See Nondominant Common Carriers Notice, at ¶¶ 14-20.

[37] 47 C.F.R. §§ 61.52(b)(1), 61.52(b)(2), 61.53, 61.54.

Cellular customers will be best served if the FCC retains its policy of allowing carriers absolute service flexibility.

For similar reasons, the Commission should allow cellular carriers to file tariffs that contain a range of rates or a maximum rate.[38] "Banded rates" will provide necessary flexibility to cellular carriers in marketing their services and responding to customer demands. GTE urges the FCC to make an explicit finding that, in the existing regulatory and market environment faced by cellular carriers, banded rates satisfy the requirements of Section 203(a) of the Communications Act.[39]

V. THE COMMISSION SHOULD RECOGNIZE THAT THE VAST MAJORITY OF CELLULAR SERVICES ARE NOT SUBJECT TO FEDERAL TARIFFING REQUIREMENTS

The decision in AT&T v. FCC did not affect the regulatory status of services that fall outside of the scope of the Communications Act's tariffing requirements. This includes services governed by Section 221(b) and other non-tariffable services offered by cellular carriers. GTE fully supports CTIA's showing that because cellular services

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[38] The Commission recently has made this proposal for non-dominant common carriers. See Nondominant Common Carriers Notice, at ¶ 22.

[39] See, e.g., Chevron, USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844-45 (1984) (courts will defer to agency's interpretation of a statute within agency's area of expertise if the interpretation is sufficiently reasonable).

typically are offered on an essentially intrastate basis and only incidentally include jurisdictionally interstate components, they are largely exempt from any tariffing obligation under the Act.[40]

A. Notwithstanding Their Geographic Scope, Most Cellular Offerings Are Exchange Service in Nature

From the inception of cellular service, the Commission's rules governing cellular systems have reflected the fact that, despite being characterized by mobile service areas of substantial size, cellular is primarily a local, intrastate exchange telephone service.[41] Thus, the regulatory structure that the FCC adopted for cellular service relies on federal jurisdiction only to ensure uniform technical standards and a competitive market structure and leaves to the states jurisdiction regarding the terms, conditions, and changes applicable to services offered to subscribers.[42]

market demands for wider coverage, the essentially local character of the service has not changed. De minimus extensions of cellular coverage areas across state lines have always been commonplace because of the nature of radio. Contract extensions and cooperative service agreements among cellular carriers further increase the utility to subscribers, who value extended service in light of the mobile nature of the cellular market. Nonetheless, as CTIA states in its Petition, most cellular calls still are completed with the MSA or RSA of origin, and the "vast majority of interstate traffic that is originated or terminated on cellular systems is transmitted over the facilities of an interexchange carrier, not those of the [redacted]"[43]

unreasonably interfere with state regulatory prerogatives. As shown below, that would be the case were the full panoply of Title II tariff requirements to be imposed on cellular services.

1. Section 221(b)

Section 221(b) of the Act, 47 U.S.C. § 221(b), reserves to the states jurisdiction over the charges for cellular radio telephone exchange service even where that service includes an interstate component. That section provides that:

> [N]othing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communications, in any case where such matters are subject to regulation by a State commission or by local governmental authority.[44]

The nature and history of cellular service support the broadest possible construction of this language to exempt cellular services from the obligation to file federal tariffs.

Under Section 221(b), to be exempt from federal tariffing, a service offering must be (1) an "exchange

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[44] 47 U.S.C. § 221(b).